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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1172

Filed: 1 August 2017

Wake County, No. 13 CRS 231273

STATE OF NORTH CAROLINA

v.

DOUGLAS WAYNE HOWELL

Appeal by defendant from judgment entered 29 February 2016 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 3 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Kimberly P. Hoppin, for defendant-appellant.

CALABRIA, Judge.

Where the absence of verbatim transcript or adequate alternative narration precluded the Court's ability to review defendant's contentions on sentencing and precluded meaningful appellate review, we vacate and remand for a new sentencing hearing.

I. Factual and Procedural History

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On 15 October 2015, Douglas Wayne Howell (“defendant”) pleaded guilty in open court to the offense of misdemeanor failure to return rental property, a Class 3 misdemeanor. The relevant facts, as presented by the State at the plea hearing, are as follows.

Beginning in October of 2013, defendant rented trucks for his grain transport business from a rental company called Penske. The first two trucks were damaged in collisions. At issue was the third truck that defendant had rented from Penske. Penske did not have a signed contract with defendant, but a week-to-week agreement, wherein defendant would rent a truck, and Penske would hold his credit card. If defendant did not return the truck by the end of the week, he would be charged.

In late November of 2013, defendant stopped paying for the truck, but did not return it. Subsequently, on 16 December 2013, he was involved in a third collision, resulting in extensive damage to the third truck.

The State agreed to have the case continued for sentencing to allow defendant to raise the money needed to pay restitution. The trial court entered a prior conviction level worksheet, and determined that defendant had one prior misdemeanor conviction for shoplifting, placing his prior misdemeanor conviction level at II. Pursuant to the plea agreement, the trial court entered judgment and sentenced defendant to 15 days in the custody of the Wake County Sheriff’s Department. The trial court then suspended this sentence, and placed defendant on

supervised probation for 12 months. The trial court also taxed defendant with fees and costs, and \$5,000 in restitution.

Defendant appeals.

II. Standard of Review

A defendant who pleads guilty has a right of appeal limited to the following:

1. Whether the sentence “is supported by the evidence.” This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
2. Whether the sentence “[r]esults from an incorrect finding of the defendant’s prior record level under G.S. 15A-1340.14 or the defendant’s prior conviction level under G.S. 15A-1340.21.” N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
3. Whether the sentence “[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
4. Whether the sentence “[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
5. Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b) (2001), 15A-1444(e) (2001);
6. Whether the trial court improperly denied defendant’s motion to withdraw his guilty plea. N.C. Gen.

Stat. § 15A-1444(e).

State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

“[We review alleged sentencing errors for] whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation and quotation marks omitted).

III. Analysis

In his sole argument on appeal, defendant contends that the trial court erred in sentencing him to the custody of law enforcement, and then suspending the sentence in favor of supervised probation. Because insufficiencies in the record preclude appellate review, we vacate the trial court’s sentence and remand for resentencing.

As a preliminary matter, we note that defendant pleaded guilty, thus limiting his avenues for appeal. However, his appeal concerns “[w]hether the sentence [c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level[,]” and is thus a proper appeal to this Court. *Jamerson*, 161 N.C. App. at 528, 588 S.E.2d at 546 (citation and quotation marks omitted).

N.C. Gen. Stat. § 15A-1340.23 provides that, for a Class 3 misdemeanor, a defendant with a prior conviction level II and between one and three prior convictions is subject to 1 to 15 days community sentencing. N.C. Gen. Stat. § 15A-1340.23(c)(2)

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(2015). However, pursuant to subsection (d) of that statute, which is effective for all offenses committed on or after 1 December 2013, “[u]nless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.” N.C. Gen. Stat. § 15A-1340.23(d).

Defendant was convicted of a Class 3 misdemeanor, and was found to have a prior conviction level II based on having a single prior misdemeanor conviction. He contends, therefore, that pursuant to N.C. Gen. Stat. § 15A-1340.23(d), the trial court could only sentence him to pay a fine, instead of 15 days in custody or 12 months of probation.

The question before this Court, then, is whether subsection (d) applies, or more accurately, the date of the offense in the instant case. If the offense occurred before 1 December 2013, subsection (d) was not effective, and the trial court was authorized by statute to impose jail time and probation; if it occurred after 1 December 2013, however, the trial court was only authorized to impose a fine.

The arrest warrant in the instant case lists the date of the offense as a range, from 21 November 2013 through 25 December 2013. The indictment also lists a range of dates of the offense, from “November 21, 2013, through December 25, 2013[.]” However, the superseding information to which defendant pleaded guilty clearly reflects the date of the offense as “December 16, 2013[.]” The transcript of plea

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likewise uses the 16 December 2013 date, and during the plea hearing the State represented to the trial court:

I've taken the liberty of doing a superseding information. Don't know that it was necessary. The indictment gave a range of dates. We've settled on a fixed offense date. The information states that.

...

[O]n the date of December 16th of 2013, [defendant] was involved in a collision that resulted in pretty extensive damage to that third Penske truck. At that point, he was not paying for it and he had not returned it to Penske.

...

[A] week or so before that collision . . . [defendant] had stopped paying for the truck[.]

Notwithstanding these facts, the State submitted a brief in support of its argument to apply the pre-1 December 2013 sentencing grid. In this brief, the State argued that defendant's offense occurred not when the truck was damaged on 16 December 2013, but when defendant first received notice that he was failing to return the rented truck. Specifically, Penske stopped receiving payments from defendant for the rental vehicle beginning on 21 November 2013. The State therefore contends that the offense occurred on that date, rather than on 16 December 2013. The State further noted that 16 December was not a date of violation, but rather an arbitrary designation of a contractual end date, given that defendant's contract with Penske had no fixed date of termination. Further, the State noted that it had entered into

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the plea agreement with defendant to reduce the charge from a Class H felony to a Class 3 misdemeanor with the understanding that, if defendant failed to make restitution, he could be put on probation. The State suggested that to preclude probation would defeat one of the purposes of the plea agreement. As a result of this, the trial court found the date of offense to be 21 November 2013, which permitted the imposition of a sentence entailing jail time and probation, as opposed to only a fine.

We note, however, that the context of the plea agreement is absent from the record. While the signed transcript of plea is present in the record, there is no evidence in the record to support the State's contentions with respect to its negotiations with defendant. In fact, in the State's brief to the trial court in favor of applying the pre-1 December 2013 sentencing guidelines, the State refers to an "implicit, if not explicit, understanding between the parties[.]" seemingly recognizing the absence of anything explicit beyond the signed transcript of plea. In the absence of some actual record of the plea agreement, we decline to consider the State's arguments on that issue.

Similarly, there is a lack of a verbatim transcript of the sentencing proceeding in the record. Ordinarily, this is not inherently problematic; we have previously held that, "where verbatim transcripts are unavailable, a reconstruction of the proceedings may be achieved by narration." *State v. King*, 218 N.C. App. 347, 356, 721 S.E.2d 336, 343 (2012). The key is having the means to conduct a meaningful

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appellate review, even in the absence of a verbatim transcript. However, in the instant case, no reconstruction is available in the record, either. Instead, the record contains a statement that defendant's appellate counsel "asked [defendant]'s trial attorney to provide an affidavit detailing his recollection of the proceeding and has also invited input from the Assistant District Attorney concerning the proceeding. Counsel had not receive[d] any additional input from either of these parties at the time of the filing of this record." The State, in its appellate brief, acknowledges this, noting that there was no verbatim transcript, and that neither defendant's trial counsel nor the assistant district attorney offered recollections of the sentencing proceeding.

"The almost complete lack of a transcript or adequate alternative narration . . . of the proceedings in the lower court precludes our ability to review defendant's contentions . . . and precludes any meaningful appellate review." *Id.* As such, as we did in *King*, we must remand this matter for a new sentencing hearing.

VACATED AND REMANDED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).